

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE**

JIMMIE LEWIS,

Plaintiff,

v.

DR. SYLVIA FOSTER, NURSE
ASSISTANT ROBERT N. GRAY, MR.
JOHNSON 1, MR. JOHNSON 2, LANCE
SAGERS, and DAVE MOFFETT,

Defendants.

Civil Action No. 04-1350-GMS

**REPLY IN SUPPORT OF MOTION OF DEFENDANTS GRAY,
MOFFETT AND SAGERS TO ACCEPT FILINGS AS TIMELY**

Defendants Robert N. Gray, David Moffett and Lance Sagers ("Moving Defendants") respectfully submit this reply in further support of their Motion to Accept as Timely (D.I. No. 254), Moving Defendants' Motion for Summary Judgment and Opening Brief in Support thereof (DI. Nos. 252, 253.) In support of their Motion, Moving Defendants state as follows:

1. As explained in Moving Defendants' Motion, counsel for the Moving Defendants had technical problems accessing the Court's Case Management/Electronic Case Filing ("CM/ECF") system on March 26, 2008, the date upon which summary judgment motions and supporting papers were due to be filed. Despite counsel's having confirmed log-in and password information, the CM/ECF system would not accept Moving Defendants' filings on the afternoon of March 26, 2008. On the morning of March 27, 2008, counsel was able to get the CM/ECF system to accept the filings.

2. Although the Court's CM/ECF system would not accept Moving Defendants' motion and brief on the afternoon of March 26, 2008, Moving Defendants had in fact completed the motion and brief as of that date and, on March 26, 2008, served counsel for defendant Sylvia Foster by hand delivery and served plaintiff Jimmie Lewis ("Plaintiff") by first class mail.

3. A letter to the Court from counsel for defendant Foster confirms that Moving Defendants' summary judgment papers were in fact completed and served on March 26, 2008. (D.I. No. 257.)

4. In opposition to Moving Defendants' Motion, Plaintiff raises objections to the content of Moving Defendants' motion for summary judgment. (D.I. 262.) Plaintiff's objections are addressed in the Moving Defendants' Reply Brief in Support of Their Motion For Summary Judgment, filed herewith.

5. Plaintiff also claims to have been prejudiced because he did not receive Moving Defendants' summary judgment motion until March 29, 2008. (D.I. 262, ¶ 2.) However, Plaintiff was in fact timely served with Moving Defendants' Motion, and therefore he suffered no prejudice from it being electronically filed on the morning of March 27, 2008. Nor is there anything unusual about service by mail taking three days; indeed, that is what the Federal Rules of Civil Procedure contemplate. *See* Fed. R. Civ. P. 6(d)(allowing 3 additional days for response when service is by mail).

6. The lack of prejudice to Plaintiff is further demonstrated by the fact that Plaintiff filed a timely response to Moving Defendants' summary judgment motion on April 2, 2008 (D.I. 259) (Plaintiff's answering papers are dated March 31, 2008).

7. Plaintiff also suggests that the CM/ECF system "shut-off" at 4:00 p.m. at the close of the Court's business day (D.I. 262, ¶ 7). Plaintiff's statement reflects a misunderstanding of the CM/ECF system, which generally permits filings at any hour of the day.

8. To summarize, the Moving Defendants' inability to file their summary judgment papers on Wednesday May 26, 2008, was inadvertent, and caused by a technical problem with the CM/ECF system. Moving Defendants timely completed, and timely served, their motion and supporting papers, and promptly filed those papers on the morning of May 27, 2008. Plaintiff suffers no prejudice from the Moving Defendants' motion having been electronically filed on May 27, 2008, and accordingly the Court should accept Moving Defendants' summary judgment filings as timely.

WHEREFORE, for the foregoing reasons and those stated in their Motion, the Moving Defendants respectfully request that this Court enter an order determining that the Moving Defendants' Motion for Summary Judgment, and Opening Brief in Support thereof with exhibits, shall be deemed timely filed with the Court.

WOLFBLOCK LLP

/s/ Joseph C. Schoell

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